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No. 309.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1938.

THE UNITED STATES OF AMERICA,
Appellant,

v.

DURKEE FAMOUS FOODS, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

BRIEF FOR APPELLEE.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

BRIEF FOR APPELLEE.

Preliminary Statement.

The identical questions involved in this case are also involved in the cases of *U. S.* v. *Manhattan Lighterage Corporation*, No. 310, and *U. S.* v. *Colgate-Palmolive-Peet Company*, No. 311, and this brief, prepared in collaboration by counsel for the appellees in all three cases, is intended to apply to and is submitted in behalf of all the appellees.

Opinion Below.

The opinion of the District Court (R. 14) on the order appealed from has not been reported, but its opinion (R. 31 and 33) on the order quashing the prior indictment involved herein is reported in 17 Federal Supplement at page 846.

Questions Presented.

1. Whether a new indictment returned after the expira tion of the applicable period is saved from the bar of limita tions, under Section 1 of the Act of May 10, 1934, when i is returned at the *same term* of court during which the prio indictment was quashed.

2. Whether, within the meaning of the said savin statute, a prior indictment (charging the acceptance of concession from a tariff) was "found defective or insuf cient" when, though the indictment was sufficient upon it face (assuming the truth of the facts alleged therein) it wa found, upon a motion to quash, that the *fact* as to the tari was, in a vital respect, at variance with the allegation.

Statement.

The three-year period under the statute of limitatio (U. S. C. Title 18, Sec. 582) had already run on April 1937, when the present indictment was filed (R. 1), t alleged offenses having occurred in August 1932, more tha three years prior to said date, i. e. nearly five years pri thereto. Concededly, therefore, this prosecution is barr by limitations unless it can be shown to have been saved the Act of May 10, 1934 (48 Stat. 772, U. S. C. Title Sec. 587).

Appellee deems it necessary to correct the followi inaccuracies and omissions in the Statement in appellan brief:

It is not accurate to say, as in the Statement at pag of appellant's brief, that the prior indictment was bas upon the facts set forth in the present indictment. T prior indictment alleged (contrary to the fact) a tar wherein the ordering of tank barges was *not* a conditi precedent to the applicability of the pumping charge. Ha ing thus alleged a pumping charge without a condit

precedent appellant of course did not allege the occurrence of the condition precedent. Taking as true its allegation as to the fact of the tariff there was no occasion to allege in the prior indictment that appellee had ordered the tank barges.

The facts alleged in the present indictment differ vitally from those alleged in the prior indictment in that (1) the present indictment alleges (truthfully) that in the tariff the shipper's ordering of tank barges was made a condition precedent to the applicability of the pumping charge; and (2) the present indictment alleges correspondingly that "said defendant did order in writing * * * tank barges".

The Statement in appellant's brief at page 5 is incomplete, and hence misleading, in that it fails to state that appellee's motion to quash the prior indictment was filed with the District Judge, with the stipulation as to the facts, on April 3, 1935 (R. 30 and 34) and was orally argued on that date. The delay from April 3, 1935 until January 15, 1937, when the motion was filed by the judge with the clerk, was not the delay of the defendant, but was the act of the District Judge withholding his decision upon the motion to quash.

Appellant's Statement also fails to make it clear that, at the time appellee made and argued its motion to quash the prior indictment, there still remained four months of the original three-year period of limitations within which appellant might have obtained a new indictment, even without the benefit of the saving statute.

Appellant's Statement also fails to make it clear that, even after appellee filed its plea in bar to the new (the present) indictment (June 18, 1937, R. 10), appellant still had plenty of time to obtain an indictment in strict compliance with the saving statute (assuming it applies at all) i. e. at the "next succeeding term of court". The said "next succeeding term" was then sitting, and continued to sit for several months and, if the saving statute applies at all, it would then have been entirely practicable for appellant to

have complied with its plain language, after having ha
attention called by appellee in the plainest possible ma
(i. e. by the plea in bar) to the fact that its new indictm
filed during the January term, was premature.

The foregoing facts, omitted from appellant's S
ment, are of especial materiality in view of the implic
in the foot-note at the bottom of page 5 of appellant's b

Appellant's statement, at page 5, that the quashi
the prior indictment was

> " * * * on the ground that the indictment fail
> allege that appellee's request upon the railroa
> tank barges was made 'in writing' "

is misleading, in that it implies that a request for b
was alleged, and that the defect in the allegation was m
that (though alleging a request) it failed to allege tha
request was "in writing". As a matter of fact, the
indictment did not allege any request *at all,* in writi
otherwise. Nor, as we have pointed out, did it allege
the tariff made said request (in writing or otherwi
condition precedent to the applicability of the pum
charge.

It appears from the indictment (R. 2) that oil is t
ported across New York Harbor either in tank barges
tank cars on floats. If it is a matter of indifference t
shipper which of the two means be employed to get th
across the harbor, there is, under the published tari
pumping charge, even if (for the carrier's own conveni
it happens that tank barges, though not ordered o
quested, are actually employed. The pumping charge
applies only when the shipper insists upon the use of
barges, and they are available and are actually used.

Appellant places undeserved emphasis upon the
tional specification that the shipper's order for tank b
be made "in writing". The emphasis should actual
placed upon the specification that the shipper must
tank barges.

Similarly misleading is the statement at page 6 of appellant's brief that the new indictment alleges

> " • • • that appellee's order for tank barges was made 'in writing' thus curing the defect which the court found in the prior indictment."

Actually, the significant change in the new indictment is that it correctly alleges the *fact* as to the tariff, including the condition precedent. The need (in the new indictment) for the allegation that the shipper did order tank barges arises from the fact that the tariff is now truthfully alleged. The allegation that the order for tank barges was "in writing", though necessary, is relatively unimportant as compared to the other new features of the present indictment.

Summary of Argument.

I. The present indictment is concededly barred by the statute of limitations, unless it can be brought within the language of the saving statute, as to which see *infra*.

II. The provision of the saving statute that

> " • • • a new indictment may be returned at any time during the next succeeding term of court following such finding during which a grand jury thereof shall be in session" (Act of May 10, 1934, c. 278, 48 Stat. 772, U. S. C. Title 18, Section 587),

is unambiguous, and does not permit a new indictment after the expiration of the applicable period of limitation at the same term during which the prior indictment was quashed.

III. Even if the above-quoted provision were ambiguous, which it is not, the use of the contrasting expression

> " • • • *not later than* the end of the next succeeding term of such court • • • "

in the contemporaneously-enacted Section 588 of the same statute conclusively evidences a legislative intent that the word "during" shall mean during, and that the contrasting expression "not later than" shall mean not later than.

IV. While the purpose of Section 588 (applicable where the statute is *about to* expire) is to *extend* the statutory period, the purpose of Section 587 is not to extend the statutory period, but to create (after a gap) a new period, one grand-jury-term in length, since it applies only to cases where the previous period has *already* expired. Hence the gap is not the result of an erroneous construction by the court below (as argued by appellant), but by its express terms is a *sine qua non* of the applicability of Section 587.

V. There is nothing anomalous or unusual in a statutory fixing of both the beginning and the end of a period within which suits may be brought (cf. suits against municipalities; suits to recover taxes illegally exacted, etc., *infra*).

VI. "Defective or insufficient" within the intendment of the statute refers to a defect or insufficiency of *allegations* of facts constituting the alleged crime. But the vice of the prior indictment was not that it failed to *allege* facts which (if true) would constitute a crime, but that its allegation of the essential *fact* as to the tariff was *false*. It was only because the allegation as to the fact of the tariff was found on motion to quash to be *false* (i. e. omitting the condition precedent) that the occasion arose for alleging the occurrence of the condition precedent. The prior indictment, therefore, was not "found defective or insufficient" within the intendment of the statute, but was found on motion to quash to be *false in fact*.

ARGUMENT.

I.

The language of the statute is plain and unambiguous and there is no occasion for construction.

The present indictment is concededly barred unless it can be brought within the language of the saving statute, which permits a new indictment to be returned at any time during the next succeeding term of court. In order to save this indictment the statutory provision must be stretched beyond the plain and unambiguous meaning of its language. The expression "*during* the next succeeding term" cannot be stretched so as to mean "*not later than* the end of the next succeeding term". Speculations as to the legislative intent are academic under such circumstances. The intent must be ascertained from the plain and unambiguous language.

U. S. v. *Standard Brewery Co.*, 251 U. S. 210, 217;
U. S. v. *Missouri Pacific Railroad Co.*, 278 U. S. 269, 277;
Commissioner v. *Gottlieb*, 265 U. S. 310, 313;
Russell Motor Car Co. v. *U. S.*, 261 U. S. 514, 519;
U. S. v. *Goldenberg*, 168 U. S. 95, 103.

Nor may a court, where the language of a statute is unambiguous and plain upon its face, either add words to it or take words from it in order to make it state or conform to a meaning other than its plain and unambiguous meaning. As was said by Judge Fake in the court below (R. 15, 16):

> "It is urged that a reasonable and proper consideration of this section causes it to become effective as to the then existing term of Court, notwithstanding the fact that the statute itself is silent as to the then existing term. (Citing Endlich on Interpretation of Statutes, pages 599, etc. U. S. *v.* N. Y. Central Railroad, 212 U. S. 509. U. S. *v.* Koenig Coal Co., 270 U. S. 512. U. S. *v.* Baltimore Post Co., 2 Fed. (2d) 761, affirmed 268 U. S. 388. Ozawa *v.* U. S., 260 U. S. 178.)

"Counsel for the defendants argue that to so construe the statute would cause the Court to enter the sphere of the legislature and in effect amend the Act to read as follows:

"'A new indictment may be returned at any time during the next succeeding term of court, following such finding, during which the Grand Jury thereof shall be in session *and as well at the Term in which the indictment is found defective.*' (Italics ours).

* * * it is my conclusion that the Court, being without power to amend the statute involved, and it appearing that the statute itself contains no ambiguity, either patent or latent, must give to the statute the generally accepted meaning of the language used therein."

II.

Even if the language were ambiguous, the contemporaneous use in Section 588 of the expression "not later than", when that was the legislative intent, clearly indicates that the contrasting word "during" was intended literally in Section 587.

Whether the language of Sections 587 and 588 is the language of the Attorney-General (as intimated at pages 15 and 16 of appellant's brief) or (as impliedly argued by appellant) is the language of Congress, in either case the draftsman evidences sufficient intelligence to employ the expression "not later than" when such is the intent, and therefore must be deemed, when employing the word "during" instead of "not later than", to have *intended* "during" rather than "not later than".

When the same statute employs contrasting expressions, it is deemed to have intended contrasting meanings, particularly where the words are plain and unambiguous.

People v. *Campbell*, 110 Cal. App. 783, 786;
Commonwealth v. *Woodring*, 289 Pa. 437, 449;
Novicki v. *O'Mara*, 280 Pa. 411, 416;
Ex Parte Dees, 50 Cal. App. 11, 19;
Endlich, Interpretation of Statutes, Secs 382-3;

III.

The "gap" which appellant ascribes to an erroneous construction by the Court below, is actually an express sine qua non of the applicability of the statute.

It is Section 588, rather than Section 587, which contemplates a mere *extension* of the statutory period, as distinguished from a re-creating or reviving of a previously expired statutory period.

But obviously Section 587, by its express language, comes into play only

> "• • • *after* the period prescribed by the applicable statute of limitations has expired"

There is therefore nothing "illogical" or "unreasonable" about the

> "• • • interruption, of, or break in, the continuity of the period for reindictment under Section 1, as construed by the District Court"

as argued at page 22 of appellant's brief.

IV.

There is nothing unusual about a statutory fixing of both the beginning and the end of a period within which suits may be brought.

Appellant apparently sees an insuperable obstacle to a construction which fixes both a beginning and an end to a period within which suits may be brought. While appellant can understand a prohibition of suits *after* a specified date, it finds difficulty in understanding a prohibition of suits *before* a specified date.

There is, however, nothing unusual about such a requirement. One illustration is found in taxpayers' suits to recover back taxes which have been illegally exacted. Not only does the revenue act prohibit the bringing of such suit *after* the expiration of the statutory period (U. S. C. Title 28, Sec. 41 (20), U. S. C. Title 26, Secs. 1672-3) but the act fixes a time *before* which such suits may not be brought (U. S. C. Title 26, Secs. 1672-3).

Another illustration is found in suits against municipalities, under statutes fixing not only the end but also the beginning of the period during which such suits may be brought.

New York City Charter of 1897,
(as revised and amended) Sec. 261.
New York Civil Practice Act Sec. 48.

Still another illustration is found in suits against executors.

In view of the clarity of the statutory language it is not necessary or important to determine *why* Section 587 fixes both the beginning and the end of the permissible statutory period, while Section 588 fixes only the end.

Nor are we concerned with the reason for the distinction. But that such a distinction was in fact made, for some reason which appeared cogent to the Attorney-General and to Congress, is clear. The Attorney-General called to the attention of the Senate Committee on the Judiciary (see pp. 15 and 16 of appellant's brief) the fact that the interests of the government might be prejudiced when an indictment was found defective after or very shortly before the running of the statute of limitations. Accordingly he recommended that *in either case* it be provided that "a new indictment may be returned at any time during the *first succeeding* term of court at which a grand jury is in session." All he asked for in his letter and all that was needed was a right to re-indict at a succeeding term. That was what he sought

but as applied to the case dealt with by Section 588, in which the original indictment had been found defective before the statute had run, express authority to re-indict at a succeeding term might easily be held to be exclusive and to destroy by implication the already existing power to re-indict at the same term at which the finding was made. It would certainly raise the question. Consequently in the Act as passed (and apparently as originally drafted by the Attorney-General) the two situations were provided for in separate sections. In Section 588, directed to the situation in which the statute has not yet run, the existing right to re-indict at the current term was preserved from such possible implication.

In Section 587, however, there was no occasion to avoid any such implication.

V.

The prior indictment was not found "defective or insufficient" within the intendment of the saving statute.

In the footnote to page 24 of appellant's brief appellant fails to state that, though there is no mention of the foregoing point in the opinion of the court below, the point was argued both orally and in the briefs.

The failure of the court below to discuss this point of course does not prevent this Court from considering it, as an additional, or alternative, ground for affirmance.

> *U. S.* v. *Norris* (C. C. A. 8th Circ.), 222 Fed. 14, 20;
> *Chicago Title Co.* v. *Newman* (C. C. A. 7th Circ.), 187 Fed. 573, 577.

The words defective and insufficient are, in ordinary parlance, synonymous. As applied to criminal indictments they connote something *lacking*, an omission of some allega-

tion of fact, or facts, necessary to constitute a crime, or charge an offense.

A perfect illustration of an indictment being "found defective or insufficient" would have been furnished in the very case at bar, if the prior indictment had correctly alleged the *fact* as to the pumping charge tariff (i.e. including the condition precedent to its applicability), and had then failed to alleged facts constituting the occurrence of said condition precedent, i.e. the fact that the shipper had ordered tank barges.

Such an indictment would have been "defective or insufficient" within the intendment of the saving statute.

But in the prior indictment, as it was actually drawn, there was no occasion to allege the *occurrence* of the condition precedent, because, assuming the truth of the allegation as to the fact of the tariff, the tariff contained no condition precedent.

Since the prior indictment falsely alleged the tariff (*without* the condition precedent) and alleged a concession from said tariff, it was, in that respect, "sufficient" upon its face and hence was not either insufficient or defective.

The vice of the prior indictment was that it falsely alleged the fact as to the pumping charge tariff. Having alleged the pumping charge falsely, and assuming the truth of that allegation, the prior indictment was not "insufficient" or "defective" by reason of its omitting an allegation that tank barges had been ordered by the shipper.

The prior indictment, therefore, was not found either "defective" or "insufficient", within the intendment of the saving statute, but was found to be false in fact, with respect to the essential allegation as to the pumping charge tariff.

It is true that the order quashing the prior indictment described it as "insufficient", but said order did not use the term within the intendment of the saving statute, and in any event we submit that this Court should examine for itself the

prior indictment and ascertain whether its vice was insufficiency or *falsity*.

It will be noted that the prior indictment could not have been dismissed upon demurrer, or motion to dismiss, because it was sufficient upon its face.

It could be, and was, quashed only in the course of a proceeding wherein there was a *factual* determination as to the nature and terms of the tariff. That determination might have been made at the conclusion of a jury trial, upon an instructed verdict. Actually, it was made upon a motion to quash, the true fact (fatally contrary to the fact alleged in the indictment) having been evidenced by a stipulation (R. 30), and not having been ascertainable from the face of the indictment itself.

While motions to quash perhaps sometimes serve the functions of demurrers, they are also employed for the purpose of determination of facts which, though not alleged in the indictment, are matters of public record or are otherwise incontrovertible or undisputed. In the instant case the fact was a matter of public record, which could not be seriously disputed, and was evidenced to the district court by means of a stipulation. The court's judgment, nevertheless, was essentially based upon the determination that a vital *fact* was at variance with the fact alleged in the indictment, so that, logically analyzed, the judgment quashing the prior indictment was as truly an adjudication based on fact as though there had been a jury verdict as to such fact.

Furthermore, so far as the particular indictment before this Court is concerned we submit that neither the January nor the April Grand Jury had any power to return it. The power to find a new indictment must be to find a new indictment upon the same facts. Appellant appears to recognize that, for in its brief it states that the new indictment against this defendant is for the same offenses. Whether or not that is so, certainly the present indictment charges new and *different* facts. In the original indictment appellee was charged

with receiving concessions under certain incorrectly stat circumstances. It was charged that appellee did certain ac and that *those acts* amounted to receiving an unlawful r concession. And they would have, if the allegation as t the tariff had been true. But it was not true. Therefor a new indictment was found charging *different* facts as to th railroad rate involved.

It follows that the prior indictment was not "found de fective or insufficient", within the meaning of the savin statute, but was found to have been *false in fact.*

Conclusion.

For the reasons stated it is respectfully submitted that the judgment of the District Court under review sustaining the plea in bar and dismissing the indictment should be affirmed.

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January, 1939.

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